Daewoo Corp v Bauer (M) Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3–24–86 OF 1998
NIK HASHIM J
23 APRIL 1999

Civil Procedure *— Res judicata — Issue estoppel — Abuse of process — Unconditional appearance — Notice of counterclaim and affidavit on merits filed — Whether constitute fresh step in proceedings that debarred defendant from challenging claim — Whether estoppel or waiver apply in matters of public policy*

The plaintiff was the main contractor and the defendant was the sub-contractor in respect of 13 work orders. Disputes arose between the parties on the work orders and were referred to arbitration. An arbitrator was appointed to adjudicate the dispute covering all the 13 work orders. The plaintiff challenged the jurisdiction of the arbitrator in respect of eight work orders. The court ruled that the arbitrator had no jurisdiction to arbitrate the eight work orders. Subsequently, the plaintiff filed an originating summons ('the second OS') seeking for a declaration that the arbitrator did not possess the jurisdiction to adjudicate the dispute in respect of the remaining four work orders. The defendant raised a preliminary objection that the plaintiff was barred by res judicata and issue estoppel in the wider sense from bringing the second OS when the plaintiff could have included the four work orders in the first OS on the ground that the present four work orders form the subject matter of the same arbitration as the eight work orders which were the subject matter of the first OS. It was submitted that the second OS was an abuse of process and ought to be dismissed in limine. The plaintiff submitted that the defendant could not raise the plea as the defendant had taken another step in that: (i) the defendant had filed unconditional appearance; (ii) the defendant had filed a notice of counterclaim; and (iii) the defendant had filed an affidavit on merits before filing the affidavit raising the plea of res judicata.

Held, allowing the preliminary objection:

(1) The three matters filed by the defendant did not constitute a fresh step in the proceedings that debarred the defendant from challenging the validity of the plaintiff's second OS. The defendant did not waive its right to challenge the plaintiff's second OS as the basis of the defendant's preliminary objection was grounded on the plaintiff's abuse of process by filing the second OS and this abuse was founded on public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation. Unlike private interest, there can be no estoppel or waiver of any matter founded on public policy such as abuse of process. It is the inherent jurisdiction of the court to deal with an abuse. Once an abuse of process is established, the court is empowered to dismiss the action (see p 421E–H).

(2) The defendant's counterclaim was a separate and independent action of the plaintiff's claim. The defendant was asking for the opposite relief and it was therefore not an affirmation of the correctness of the plaintiff's claim. Likewise, the act of filing of the affidavits by the defendant (see p421H–I). A

(3) The issue of the four work orders in the second OS clearly could and should have been raised in the first OS. The issue in the second OS was common and properly belonged to the subject matter of litigation in the first OS, ie whether the arbitrator appointed had the jurisdiction to arbitrate the disputes between the same plaintiff and defendant. It became an abuse of process of the court to raise the four work orders in subsequent proceedings in the second OS. In the event, the plaintiff was barred from bringing the second OS (see pp 424G–I). B C

[Bahasa Malaysia summary D

Plaintif merupakan kontraktor utama dan defendan merupakan subkontraktor berkenaan dengan 13 pesanan-pesanan kerja. Pertikaian timbul antara pihak-pihak di atas pesanan-pesanan kerja tersebut dan dirujuk kepada timbang tara. Seorang penimbang tara dilantik untuk menghakimi pertikaian tersebut yang meliputi kesemua 13 pesanan-pesanan kerja tersebut. Plaintif mencabar bidang kuasa penimbangtara berkenaan dengan lapan pesanan-pesanan kerja. Mahkamah memutuskan bahawa penimbangtara tersebut tidak mempunyai bidang kuasa untuk menimbang tara lapan pesanan-pesanan kerja tersebut. Kemudiannya plaintif memfailkan saman pemula ('SP kedua tersebut') memohon deklarasi bahawa penimbang tara tersebut tidak mempunyai bidang kuasa untuk menimbang tara pertikaian tersebut berkenaan dengan baki empat pesanan-pesanan kerja tersebut. Defendan membangkitkan bantahan awal bahawa plaintif adalah dihalang oleh res judicata dan isu estopel di dalam maksud yang lebih luas daripada membawa SP kedua tersebut apabila plaintif boleh memasukkan empat pesanan-pesanan kerja tersebut di dalam SP pertama atas alasan bahawa empat pesanan-pesanan kerja tersebut yang kini daripada perkara subjek timbang tara yang sama memandangkan lapan pesanan-pesanan kerja tersebut adalah perkara subjek SP pertama tersebut. Adalah dihujahkan bahawa SP kedua tersebut adalah suatu penyalahgunaan proses dan sepatutnya ditolak secara limine. Plaintif berhujah bahawa defendan tidak boleh menimbulkan rayuan tersebut memandangkan defendan telah mengambil satu lagi langkah iaitu: (i) defendan telah memfailkan suatu kehadiran tidak bersyarat; (ii) defendan telah memfailkan suatu notis tuntutan balas; dan (iii) defendan telah memfailkan suatu afidavit atas merit-merit sebelum memfailkan afidavit tersebut yang membangkitkan rayuan res judicata. E F G H I

Diputuskan, membenarkan bantahan awal:

(1) Ketiga perkara-perkara yang difailkan oleh defendan tidak terjumlah suatu langkah baru di dalam prosiding-prosiding yang menghalang defendan daripada mencabar kesahan SP kedua plaintif tersebut. Defendan tidak mengketepikan haknya untuk mencabar SP kedua plaintif tersebut kerana dasar bantahan awal defendan adalah berdasarkan penyalahgunaan proses oleh plaintif dengan memfailkan SP kedua tersebut dan penyalahgunaan ini adalah atas polisi awam di dalam menghalang tindakan-tindakan yang banyak, ia adalah untuk kepentingan awam bahawa seharusnya wujudnya penghabisan kepada litigasi. Berbeza dengan kepentingan peribadi, tidak boleh wujudnya estopel atau penepian apa-apa perkara atas polisi awam seumpama penyalah-gunaan proses. Adalah dalam bidang kuasa sedia ada mahkamah untuk menangani suatu penyalahgunaan. Setelah suatu penyalah-gunaan proses dipastikan mahkamah adalah berkuasa untuk menolak tindakan tersebut (lihat ms 421E–H).

(2) Tuntutan balas defendan adalah tindakan yang berlainan dan berasingan dari tuntutan plaintif. Defendan meminta untuk relif yang bertentangan dan ia bukanlah suatu pengesahan ketepatan tindakan plaintif. Begitu juga dengan tindakan memfailkan afidavit-afidavit oleh defendan (lihat ms 421H–I).

(3) Isu empat pesanan-pesanan kerja di dalam SP kedua tersebut dengan terangnya boleh dan sepatutnya ditimbulkan di dalam SP pertama tersebut. Isu di dalam SP kedua tersebut adalah sama dan sepatutnya tergolong dalam perkara subjek litigasi di dalam SP pertama tersebut, iaitu sama ada penimbang tara tersebut yang dilantik mempunyai bidang kuasa untuk menimbang tara pertikaian-pertikaian antara plaintif dan defendan yang sama. Adalah merupakan penyalahgunaan proses mahkamah untuk membangkitkan empat pesanan-pesanan kerja tersebut di dalam prosiding-prosiding selanjutnya di dalam SP kedua tersebut. Plaintif dihalang daripada membawa SP kedua tersebut (lihat ms 424G–I).]

Notes

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Brisbane City Council & Anor v Attorney General for Queensland [1978] 3 WLR 299 (refd)

Divine-Bortey v Brent London Borought Council The Gazette, 3 June 1998 (refd)

Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357 (refd)
Greenhalgh v Mallard [1947] 2 All ER 255 (refd)
Henderson v Henderson [1843–60] All ER Rep 378 (refd)
Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1999] 1 MLJ 193 (refd)
New Brunswick Railway Co v British and French Trust Corp Ltd [1939] AC 1 (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494 (refd)
Talbot v Berkshire County Council [1993] 4 All ER 9 (refd)
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

Legislation referred to

Rules of the High Court 1980 O 4 r 1(1), O 5 r 1(1)(a)

MK Chen (*Azman Davidson & Co*) for the plaintif.
RR Sethu (*Swee Im Tan* with him) (*David Chong & Co*) for the defendant.

Nik Hashim J: The plaintiff, Daewoo Corp, applied by way of this originating summons ('the second OS') for the following:

(a) a declaration that Mr John L Lim, the Arbitrator, in the arbitration between the plaintiff and the defendant (Bauer (M) Sdn Bhd) does not possess the jurisdiction to adjudicate the disputes between the plaintiff and the defendant in respect of the four work orders: PRP-A-005, PRP-A-022, PRP-A-026 and PRP-A-037 ('the four work orders');

(b) an order that Mr John L Lim and the defendant be restrained and that an injunction be granted restraining them from proceeding further with the arbitration in respect of the four work orders; and

(c) that the defendant shall pay the plaintiff the costs of and occasioned by this application.

The grounds of this application that Mr John L Lim does not have jurisdiction or power to adjudicate on the dispute between the plaintiff and the defendant in relation to the above-mentioned work orders are explained in the affidavit of Ng Ho Fatt, the General Manager of the plaintiff.

The plaintiff is the main contractor and the defendant is the sub-contractor in respect of 13 work orders. Disputes and differences had arisen between the parties on the 13 work orders and these were referred to arbitration under cl 34 of PAM Conditions of Contract. The defendant called for arbitration over all the work orders in one single notice. The President of PAM had appointed Mr John Lim as the arbitrator. It was a single appointment and covered all the 13 work orders. The plaintiff had challenged the jurisdiction of the arbitrator in respect of the eight work orders on ground of want of an arbitration agreement and on the ground that the appointment of the arbitrator did not extend to the eight work

orders. This court on 26 December 1998 in OS No R3-24-36-98 ('the first OS') after noting the application of the arbitration cl 34 to the work order PRP-A-008, gave judgment to the plaintiff and ruled that the arbitrator has no jurisdiction to arbitrate the eight work orders. It is to be noted however, that in the first OS the plaintiff applied for and obtained a single injunction for all the eight work orders. The application was limited to the eight work orders and did not include the remaining four work orders, even although the four work orders had emerged in the course of hearing of the first OS.

Mr RR Sethu, learned counsel for the defendant, in his preliminary objection to the second OS contends that the plaintiff is barred by res judicata or issue estoppel in the wider sense from bringing the present second OS in respect of the four work orders when the plaintiff could have included these four work orders in the first OS on the ground that the present four work orders form the subject matter of the same arbitration as the eight work orders which were the subject matter of the first OS. Counsel submitted that the second OS is an abuse of process and ought to be dismissed in limine and cited the rule in *Henderson v Henderson* [1843–60] All ER Rep 378 in support.

In reply, Mr MK Chen, learned counsel for the plaintiff submitted that the defendant cannot raise the plea as the defendant has taken another step in that:

(i) the defendant had filed unconditional appearance;

(ii) the defendant had filed a notice of counterclaim; and

(iii) the defendant had filed an affidavit on merits before filing the affidavit raising the plea of res judicata in the wider sense.

In my view, the above three matters filed by the defendant do not constitute a fresh step in the proceedings that debars the defendant from challenging the validity of the plaintiff's second OS (see *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357). The defendant, by filing, did not waive its right to challenge the plaintiff's second OS as the basis of the defendant's preliminary objection is grounded on the plaintiff's abuse of process by filing the second OS and this abuse is founded on public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation (see *Talbot v Berkshire County Council* [1993] 4 All ER 9 (CA)). Unlike private interest, there can be no estoppel or waiver of any matter founded on public policy such as abuse of process. It is the inherent jurisdiction of the court to deal with an abuse. Once an abuse of process is established the court is empowered to dismiss the action or stay proceedings or strike out the defence, as the case requires (see *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494). The defendant's counterclaim is a separate and independent action of the plaintiff's claim. The defendant is asking for the opposite relief and it is therefore, not an affirmation of the correctness of the plaintiff's claim. Likewise, the act of filing of the affidavits by the defendant. The defendant's affidavits disputing on the merits and raising the preliminary issue are filed with a purpose, that is, to dismiss the second OS. Having so decided, I now turn to the other grounds as advanced by the plaintiff's counsel.

It is the submission of the learned counsel for the plaintiff that the doctrine of res judicata or issue estoppel in the wider sense is not applicable in this case because the second OS is based on subject matter and facts which are materially different from those of the first OS. The second OS relates to four work orders which are separate and distinct contracts with different causes of action from the eight work orders in the first OS. The subject matter is entirely different. There is no duty on the plaintiff to bring all its causes of action in one proceeding. Further, counsel argues that the doctrine can only be invoked against the litigant who lost the first proceeding. As the plaintiff won the first OS, the said doctrine cannot apply to the plaintiff.

The doctrine that a party may be shut out from raising in a subsequent action an issue which he could, and should have been raised in earlier proceedings is contained in the judgment of Wigram V-C in *Henderson* where at p 115 he stated:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which *might* have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject of litigation*, and which the parties, exercising reasonable diligence, *might have brought* forward at the time. (Emphasis added.)

The above principle was enlarged in *Greenhalgh v Mallard* [1947] 2 All ER 255, where Somervell LJ at p 257 said:

> ...res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers *issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised* that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. (Emphasis added).

The Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 in reaffirming the principle in *Henderson* states at p 590:

> ... But there is a wider sense in which the doctrine may be appealed to, so that *it becomes an abuse of process to raise in subsequent proceedings matters which could and* therefore *should have been litigated in earlier proceedings.* (Emphasis added.)

The classic principle in *Henderson* was quoted with approval and was explained by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and the Federal Court in *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193.

The Supreme Court in *Asia Commercial Finance* extended res judicata in the wider sense to apply even to different causes of action. Peh Swee Chin FCJ in delivering the judgment of the court said at p 199B:

> In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such *estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action* resulting in the final judgment, and which were not, either deliberately or due to inadvertence. (Emphasis added).

The plaintiff's counsel says the above statement in *Asia Commercial Finance* was obiter. I do not agree. The issue of res judicata by way of a cause of action estoppel formed the crux of the decision of the appeal in *Asia Commercial Finance*. This can be seen clearly in the opening paragraph of the judgment where the Supreme Court restates the law on res judicata.

In the present case, the question is whether the issues raised in the second OS are matters which could and should have been litigated in the first OS.

Having regard to the two OSs it is crystal clear that the four work orders in the second OS are based on the same issue concerning arbitration between the same parties: the defendant and the plaintiff. The President of PAM appointed the arbitrator Mr John L Lim for all the 13 work orders (PRP-A-008, first OS eight work orders and second OS four work orders) under a single letter of appointment. If the eight work orders which are separate contracts could be litigated in one proceeding under the same subject matter of arbitration in the first OS, I fail to understand why the four work orders in the second OS, even though they are claimed to be separate contracts and therefore separate causes of action, could not also be included in the first OS. The plaintiff had expressly referred the four work orders in the first OS yet it failed to claim any relief for these four work orders and no reason was offered for the failure. These four work orders had emerged during the hearing of the first OS. Thus, the inclusion of the four work orders in the plaintiff's affidavit in the first OS is conclusive that the plaintiff treated the four work orders as forming part of the same subject matter of the first OS. Therefore, since the four work orders had arisen in the earlier proceedings, they should have been brought forward and grafted in the first OS, and the relief should have been claimed accordingly. In *Divine-Bortey v Brent London Borought Council* The Gazette, 3 June 1998 at p 29, the applicant brought industrial tribunal proceedings against the council alleging that he had been unfairly selected for redundancy. In the course of the tribunal proceedings it emerged that the applicant's African accent might have had a bearing on his dismissal. The tribunal dismissed the claim for unfair dismissal so the applicant made a fresh complaint alleging racial discrimination. That claim was dismissed by a tribunal chairman on the ground that the matter was res judicata. The applicant's appeal was allowed on the ground that there was no issue of estoppel because the first tribunal had not addressed the racial issue and the second tribunal had not considered the special circumstances of the case. The council appealed. The appeal was allowed. It was held that the rule in *Henderson* that parties to litigation must bring forward their whole case and would not, except in special circumstances, be permitted to open the same subject of litigation in respect of matter which might have been litigated but had been omitted due

to negligence, inadvertence or even accident, applied to industrial tribunal proceedings; that there were no special circumstances in this case because the tribunal had found that the redundancy procedures were fair, leaving little room for a finding of racial discrimination; and that when the racial issue had arisen in the first proceedings it should have been grafted onto the original application.

The first OS was initiated by the plaintiff and it had control over it. It is, therefore, the duty of the plaintiff to join all causes of action against the defendant in a single action (see O 5 r 1 (l)(a) of the Rules of the High Court 1980 ('the RHC'). Further, the plaintiff could have applied to amend the first OS to include the present four work orders but it did not do so. The plaintiff could have taken out a second OS for the four work orders and have them consolidated (see O 4 r 1(1) of the RHC) and argued at the same time as the first OS. This course, too, was not adopted by the plaintiff.

At the outset, the plaintiff contends that the doctrine of res judicata in the wider sense does not apply to the present case as the four work orders in the second OS are different contracts and causes of action from the eight work orders in the first OS and quoted *New Brunswick Railway Co v British and French Trust Corp Ltd* [1939] AC 1 in support. There, the first proceeding concerned the construction of a bond, whereas the second proceeding concerned the construction of other similar bonds. The court held that res judicata did not apply. On a closer scrutiny of the case, I agree with counsel for the defendant that the case concerns res judicata in the narrow sense and therefore distinguishable from the present case.

With regard to the plaintiff's second argument that the doctrine can only be invoked against the losing party, I hold that the argument has no merit. The doctrine of abuse applies equally to each party. The role of parties, be that of the plaintiff or defendant, and the success or failure of that party is not the basis for the operation of the doctrine. In *Brisbane City Council & Anor v Attorney General for Queensland* [1978] 3 WLR 299 (PC), the Privy Council stressed on a 'party' not whether the party was successful or not in the earlier proceedings. Thus, the test of the doctrine is 'might or could and should the issue have been raised by a party in the earlier proceeding?' In the instant case, the defendant, though a losing party in the first OS, can raise the question of abuse against the plaintiff's failure to include the four work orders in the first OS. In my view, the defendant is right in raising the question.

It is my judgment that the issue of the four work orders in the second OS so clearly could and should have been raised in the first OS. The issue in the second OS is common and properly belonged to the subject matter of litigation in the first OS in that whether Mr John L Lim, the arbitrator, appointed under a single notice (covering 13 work orders including the present four) has the jurisdiction to arbitrate the disputes between the same plaintiff and defendant. Failure to include these four work orders for adjudication in the first OS attracts the rule in *Henderson* and hence it becomes an abuse of process of the court to raise the four work orders in subsequent proceedings in the second OS. In the event, the plaintiff is barred from bringing the second OS. The present OS is governed by *Asia*

Commercial Finance which decision binds this court. Since *Asia Commercial Finance* does not recognize the exceptions to the rule, the plaintiff is not entitled to rely on the special circumstances proviso in *Henderson*. Even if the plaintiff was entitled, the plaintiff has not, and on the facts cannot, invoke the exception.

In the premises and for reasons abovementioned, I hold that the second OS is clearly an abuse of process of the court and I therefore, cannot allow it to be litigated again. Accordingly, the defendant's preliminary objection is allowed and the plaintiff's second OS (encl 2) is struck out with costs. The defendant's counterclaim (encl 5) is set for trial to a date to be fixed.

Allowing the preliminary objection.

Reported by Jafisah Jaafar